

**87.08 History:** 1931 c. 481; Stats. 1931 s. 79.08; 1943 c. 375 s. 17; 1943 c. 490; Stats. 1943 s. 87.08; 1965 c. 614 s. 57 (2g).

**87.085 History:** 1963 c. 305; Stats. 1963 s. 87.085.

**87.09 History:** 1931 c. 481; Stats. 1931 s. 79.09; 1943 c. 490; Stats. 1943 s. 87.09; 1965 c. 614 s. 57 (2g).

**87.095 History:** 1965 c. 481; 1965 c. 614 s. 57 (2g); Stats. 1965 s. 87.095.

**87.10 History:** 1931 c. 481; Stats. 1931 s. 79.10; 1943 c. 490; Stats. 1943 s. 87.10; 1963 c. 305; 1965 c. 614 s. 57 (2g).

**87.11 History:** 1931 c. 481; Stats. 1931 s. 79.11; 1943 c. 490; Stats. 1943 s. 87.11; 1965 c. 614 s. 57 (2g).

**87.12 History:** 1931 c. 481; Stats. 1931 s. 79.12; 1937 c. 425; 1943 c. 490; Stats. 1943 s. 87.12; 1965 c. 481; 1965 c. 614 s. 57 (2g).

**87.13 History:** 1931 c. 481; Stats. 1931 s. 79.13; 1943 c. 490; Stats. 1943 s. 87.13.

**87.14 History:** 1931 c. 481; Stats. 1931 s. 79.14; 1937 c. 425; 1943 c. 490; Stats. 1943 s. 87.14; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (6).

**87.15 History:** 1931 c. 481; Stats. 1931 s. 79.15; 1943 c. 490; Stats. 1943 s. 87.15; 1965 c. 614 s. 57 (2g).

**87.16 History:** 1931 c. 481; Stats. 1931 s. 79.16; 1943 c. 490; Stats. 1943 s. 87.16; 1965 c. 614 s. 57 (2g).

**87.17 History:** 1931 c. 481; Stats. 1931 s. 79.17; 1943 c. 490; Stats. 1943 s. 87.17.

**87.18 History:** 1937 c. 425; Stats. 1937 s. 79.18; 1943 c. 490; Stats. 1943 s. 87.18; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (6).

**87.30 History:** 1965 c. 614; Stats. 1965 s. 87.30.

**CHAPTER 88.**

**Drainage of Lands.**

**Editor's Note:** This table has been designed to assist in tracing the sections of former chs. 88 and 89, repealed by c. 572, Laws 1963, into the sections of new ch. 88. Except where the word "none" has been used to indicate that the repealed provision has no counterpart in new ch. 88, the table does not show specifically what happened to the law embodied in a particular repealed provision. In most cases the law embodied in former chs. 88 and 89 was consolidated and restated without change, in some cases it was substantially changed, and in a few cases a basically new approach was taken. The notes appended to the sections of the bill will be helpful in showing specifically what changes are made in present law.

**CONVERSION TABLE**

<i>Stats. 1961</i>	<i>Stats. 1963</i>
88.01	None

<i>Stats. 1961</i>	<i>Stats. 1963</i>
88.02 (1)	88.01 (1)
(2)	88.01 (2)
(3)	88.01 (7)
(4)	88.01 (4)
(5)	88.01 (11)
(6)	88.01 (5)
(7)	88.01 (6)
(8)	88.01 (8)
(9)	88.01 (10)
(10)	88.01 (11)
(11)	88.01 (12)
(12)	88.01 (9)
88.03 (1)	88.05 (1)
(2)	88.05 (3)
(3)	88.05 (5)
(3a)	88.05 (3) (b) 3., (6) and (7)
(4)	88.05 (8)
(5)	88.34 (9)
(6)	88.03 (2)
(7)	88.07 (1)
(8) (1st sentence)	88.07 (2)
(2nd sentence)	88.07 (5)
(9)	88.07 (3)
(10)	88.07 (5)
(11)	88.07 (5)
88.04 (1)	88.17 (1)
(2)	88.17 (2), 17.10, 17.22
(3)	88.17 (3)
(4)	88.17 (4)
(5)	88.17 (6)
(6)	88.17 (5), 88.15
(7)	88.17 (6)
(8)	88.19
(9)	88.17 (8)
(10)	88.17 (7), (8)
(11)	88.54 (1)
88.05 (1)	88.27 (1), 88.28
(2)	88.29 (1)
88.06 (1)	88.29 (2)
(2)	88.29 (3)
(3)	88.29 (4)
(4)	88.29 (5)
(5)	88.29 (6)
(6)	88.29 (3), 88.32
(7)	88.30
(8)	88.30 (2)
(9)	88.34 (1)
(10)	88.34 (2)
88.07 (1)	88.34 (3)
(2)	88.34 (4), (5)
(3)	88.34 (6)
88.075	88.33, 88.81
88.08 (1)	88.35 (1), (2), (4), (6), (7)
(2)	88.35 (6)
(3)	88.35 (5)
(4)	88.36 (1)
88.09	88.36 (2), (4), (5), 88.62 (1)
88.10 (1)	88.40 (1), (2)
(2)	88.41 (1), (2)
(3)	88.41 (2) (b)
(4)	88.41 (4)
(5)	88.23
88.105	88.46
88.11	88.73, 88.77
88.115	88.22 (1), 88.06
88.117	88.80
88.12	88.54 (2)

Stats. 1961	Stats. 1963	Stats. 1961	Stats. 1963
88.13	88.42 (1)	(3)	88.09 (1)
88.14 (1)	88.42 (2), 88.43 (1), (2), (3)	89.08 (1)	88.34 (7)
(2)	88.43 (4)	(2)	None
(3)	88.42 (3)	89.09 (1)	88.41 (4)
88.15	88.68 (2), (3)	(2)	88.41 (1)
88.16 (1)	88.66	(3)	88.23 (1), 88.35 (1) (e)
(2)	88.67	(4)	88.41 (4)
88.17	88.68 (1)	89.10	88.07 (2)
88.18	88.18	89.11	88.34 (9)
88.19 (1)	88.24, 88.23	89.12	88.08
(2)	88.23, 88.06	89.13	88.17 (3)
(3)	88.63	89.14	88.07 (4)
(4)	88.17 (7)	89.15	88.09 (2)
88.20 (1)	88.79	89.16	88.05 (3) (b) 3., (6), (7)
(2)	None	89.17	None
(3)	None	89.18	88.21 (6)
88.21	88.12	89.185	None
88.22	88.10	89.19 (1)	88.27 (1), (2), 88.28
88.23	88.69 (1)	(2)	88.27 (3)
88.24	88.47	(3)	88.04 (2)
88.25	88.09	(4)	88.34 (8)
88.26 (1st sentence)	88.17 (5)	(5)	88.04 (1)
(2nd sentence)	88.21, 88.63	(6)	88.07 (3)
(3rd sentence)	88.03 (1)	89.20	88.29
88.27	88.13	89.21	88.05 (8)
88.28	None	89.22 (1)	88.29 (3)
88.29	88.02 (1), 88.03 (1)	(2)	None
88.30	88.15	(3)	None
88.31	88.15	(4)	None
88.32	88.91, 943.01	(5)	88.34 (3) (a), (5)
88.33	None	(6)	None
88.34	None	89.23 (1) to (4)	88.17
88.35	None	(5), (6), (7)	88.19, 88.54 (7)
88.36	None	(8)	88.40 (3)
88.37	None	(9)	88.24
88.38	88.87	(10)	None
88.39	88.88 (1)	89.24 (a)	88.13
88.40	88.87 (4), 88.88 (2)	(b)	88.21 (6)
88.41	88.90	(c)	88.21 (3), (4)
88.42	88.94	(d)	None
88.43	88.15 (5)	89.25	None
89.01	None	89.26 (1)	88.29 (2), 88.32 (1), (2)
89.02 (1)	None	(2)	88.30
(2)	88.01 (6)	89.27 (1) to (6)	88.34
(3)	88.01 (11)	(7) to (16)	88.31
(4)	88.01 (4)	(17)	88.34 (3), (4), (5)
(5)	88.01 (8)	(18)	88.09
(6)	88.01 (9)	89.28 (1)	88.35 (1), (6)
(7)	88.01 (11)	(2)	88.35 (2), (3)
(8)	88.01 (12)	(3)	88.35 (7)
(9)	None	89.29	88.21 (8)
(10)	88.01 (7)	89.30	88.48 (1)
89.03 (1)	88.03 (1)	89.31	88.50 (2)
(2)	None	89.32	88.36 (1)
(3)	88.03 (2)	89.33 (1)	88.36 (2)
(4)	None	(2)	88.36 (3)
89.04 (1)	88.03 (2)	(3)	88.36 (4)
(2)	88.02 (2)	89.34	88.36 (4), (5), (6)
89.05	88.10	89.35 (1)	88.41 (2), (4)
89.06 (1)	88.05 (1)	(2) (1st sentence)	88.41 (1)
(2)	88.05 (2)	(2nd sentence)	88.40 (2)
(3)	88.05 (3)	(3)	88.41 (3)
(4)	88.05 (5)	(4) to (6)	88.24, 88.23
(5)	88.05 (8)	(7)	None
(6)	None	89.36	88.42
(7)	88.05 (7)		
89.07 (1)	None		
(2)	88.07 (6)		

Stats. 1961	Stats. 1963
89.37 (1)	88.43 (1), (2)
(2), (3), (4) (a)	88.18 (2)
(4) (b) and (c)	88.43 (5)
(4) (d)	88.43 (6)
(5)	88.43 (3)
(6)	88.43 (4)
89.38	88.40
89.39	88.71 (1), (2), (3)
89.40	88.71 (4)
89.41	88.44 (1), (2)
89.42	88.92
89.43 (1) to (6)	88.66
(7), (8)	88.67
89.44	88.23
89.45	88.45
89.46	88.44 (3)
89.47 (1)	88.54 (1)
(2)	88.54 (2)
(3)	88.54 (3)
(4)	88.54 (4)
(5)	88.54 (5)
(6)	88.55 (1)
(7)	88.55 (2)
(8)	88.54 (6)
89.48 (1)	88.62 (1)
(2)	88.62 (1)
(3)	88.20
89.49	88.62 (2)
89.50	88.73
89.51	88.77
89.52	88.78
89.53	88.69 (1)
89.54	88.69 (2)
89.55	88.47
89.56	88.48 (2)
89.57	88.68 (2), (3)
89.58	88.21 (5), (9), 88.06, 88.23
89.59	88.70
89.60	88.79
89.61	88.49
89.62	88.46
89.63	88.72
89.64	88.93
89.65	88.89
89.66	88.21 (10), 88.06
89.665	88.82
89.667	None
89.668	None
89.669	88.83
89.67	88.02 (1)
89.68	None
89.69	88.91
89.70	88.14
89.71	None
89.72	None
89.75	None
89.76	None
89.78	88.22 (2)
89.80	88.56

**88.01 History:** 1963 c. 572; Stats. 1963 s. 88.01; 1969 c. 276.

**Legislative Council Note, 1963:** For the most part, this section restates definitions found in present ss. 88.02 and 89.02. The definition of "clerk of court" is new. The definition of "director of engineering" replaces the definition of "chief engineer". The definition

of "land" has been expanded so as to also cover the definition of "corporation" in the present law. In dealing with benefits to a corporation from a drainage project, the question is whether the "lands" of that corporation have been benefited, whether such "lands" be railroad right of way, streets or highways, power line easements, or some other form of real property. The definition of "net damages" has not been restated. It appears that the only place the term is used is in s. 88.62 (2), and its meaning there is clear without benefit of a definition. [Bill 1-A]

**88.02 History:** 1963 c. 572; Stats. 1963 s. 88.02.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates s. 89.67 and the first part of s. 88.29; sub. (2) restates s. 89.04 (2). The reference to vested property rights was inserted in sub. (2) to make the subsection a more complete reflection of established principles of constitutional law. [Bill 1-A]

**88.03 History:** 1963 c. 572; Stats. 1963 s. 88.03.

**Legislative Council Note, 1963:** Sub. (1) restates part of s. 88.26 and all of s. 89.03 (1) except for the part relating to removals from office. That part is covered by s. 17.10 of the statutes. Sub. (1) also restates part of s. 88.29.

Sub. (2) consolidates and restates ss. 88.03 (6), 89.03 (3) and 89.04 (1). [Bill 1-A]

Proceedings under the drainage law are equitable and should be liberally construed. In re Catfish River D. Dist. 176 W 607, 187 NW 673.

Drainage proceedings being purely statutory and equitable (although the question of damages may be tried by jury), and the right of appeal being given, a writ of error will not lie to review any order or judgment therein. In re Rocky Run D. Dist. 184 W 557, 200 NW 384.

Drainage proceedings are equitable in their nature, and while nothing can be done in violation of a direct provision of the statutes any lawful remedy contemplated in a contract between a creditor and the district not conflicting with the statutes or with public policy may be enforced. In re Dancy D. Dist. 190 W 327, 208 NW 479.

A contract for construction of drainage ditch, making the decision of the state engineer conclusive in case of dispute, did not submit all matters in controversy to arbitrators, so as to oust the court of jurisdiction. The court, independent of statute, has broad discretionary powers to prevent inequitable results in drainage proceedings. In re Lower Baraboo River D. Dist. 199 W 230, 225 NW 331.

Although the drainage law is to be liberally construed and, under 89.03, Stats. 1951, the court is to exercise equitable jurisdiction in the correction of errors, the usual powers exercised by courts of equity in the correction of errors is limited to the correction of errors so as to express the real intention of the act, and the purpose of the statute was to save a proceeding from consequences of mere irregularities, but not to permit proceedings partaking of the nature of a gerrymander. In re Jefferson County Farm Drainage, 264 W 339, 59 NW (2d) 655.

**88.04 History:** 1963 c. 572; Stats. 1963 s. 88.04.

**Legislative Council Note, 1963:** Sub. (1) restates s. 89.19 (5). Sub. (2) restates s. 89.19 (3) with coverage expanded so that it applies to all petitions under the drainage laws rather than only to petitions to organize a drainage district or annex territory to a drainage district. [Bill 1-A]

**88.05 History:** 1963 c. 572; Stats. 1963 s. 88.05; 1965 c. 252; 1969 c. 55, 276; 1969 c. 392 s. 38.

**Legislative Council Note, 1963:** This section is designed to provide uniform rules for giving of notices of hearings under the drainage laws and therefore is similar in purpose to present ss. 88.03 and 89.06. Several changes and clarifications have been made, the principal changes being the elimination of the requirement of posting, the elimination of the requirement of newspaper publication except when ordered by the court, and the addition of a provision making service of notice by mail the standard method of giving notice. Following is a more specific breakdown of the derivation of the provisions of the new section:

Sub. (1) consolidates and restates ss. 88.03 (1) and 89.06 (1). The provision in s. 89.06 (1) that the order fixing the time and place of hearing may be given nunc pro tunc has been eliminated.

Sub. (2) restates s. 89.06 (2) with the addition of a provision requiring the notice to refer to the fact that certain objections must be in writing if the objector wants to have an opportunity to be heard.

Subs. (3) and (4) are largely new. They replace ss. 88.03 (2) and 89.06 (3). As noted above, posting and publication requirements have been eliminated and service by mail substituted. The service by mail provisions also will replace scattered provisions in present chs. 88 and 89 which called for personal service or service by registered mail.

Sub. (5) is a consolidation and clarification of ss. 88.03 (3) and 89.06 (4).

Sub. (6) consolidates and restates parts of ss. 88.03 (3a) and 89.16.

Sub. (7) consolidates and revises parts of ss. 88.03 (2) and (3a), 89.06 (7) and 89.16.

Sub. (8) consolidates and restates ss. 88.03 (4), 89.06 (5) and 89.21. [Bill 1-A]

**88.06 History:** 1963 c. 572; Stats. 1963 s. 88.06.

**Legislative Council Note, 1963:** This section is new. It is designed to provide a uniform procedure for obtaining court approval of the drainage board's acts requiring such approval, much as s. 88.05 is designed to provide a uniform procedure for giving notices of hearings in drainage proceedings. It replaces numerous scattered provisions of present chs. 88 and 89. [Bill 1-A]

**88.07 History:** 1963 c. 572; Stats. 1963 s. 88.07.

**Legislative Council Note, 1963:** Sub. (1) restates s. 88.03 (7) with changes necessary to correlate it with the new court administrator act; sub. (2) is basically a consolidation of s.

89.10 and the first sentence of s. 88.03 (8); sub. (3) consolidates and restates ss. 88.03 (9) and 89.19 (6); sub. (4) restates s. 89.14; sub. (5) consolidates and restates s. 88.03 (10) and (11) and the last sentence of s. 88.03 (8); sub. (6) restates s. 89.07 (2). [Bill 1-A]

**88.08 History:** 1963 c. 572; Stats. 1963 s. 88.08.

**Legislative Council Note, 1963:** This is a restatement of s. 89.12 with some modifications: (1) the directive to the court to assess costs has been stated in mandatory rather than permissive terms; (2) provision has been made for taxing costs by order rather than by judgment, the idea of a judgment being inconsistent with the administrative nature of the proceedings; (3) provision has been made for recovery of costs by those who contested the proceeding and were successful in having the petition dismissed, as well as by the board and others who incurred expenses or advanced funds in prosecution of the proceeding; and (4) the method of giving notice of hearing on the order to show cause issued under sub. (4) has been changed from newspaper publication to mailing. [Bill 1-A]

**88.09 History:** 1963 c. 572; Stats. 1963 s. 88.09.

**Legislative Council Note, 1963:** Sub. (1) is a consolidation and revision of s. 89.07 (3) and the last sentence of s. 88.25 (1).

Sub. (2) replaces present ss. 88.25 and 89.15. Present s. 89.15 provides for appeals directly to supreme court. Present s. 88.25 provides for an appeal to circuit court before an appeal can be taken to supreme court, but it applies only to an order organizing or refusing to organize a drainage district or confirming assessments of benefits or awards of damages. In order to fill the gap left by s. 88.25, s. 89.15 has been construed to be applicable in drainage proceedings under ch. 88. Thus, in the case of an order confirming additional assessments to pay the costs of principal and interest on defaulted bonds, appeal was held to lie directly to the supreme court under s. 89.15. *See In re Farm Drainage Dist. No. 1, Waupaca County*, 232 Wis. 455, 287 NW 806 (1939). The new section provides a uniform appellate procedure for all drainage proceedings. The provision for appeal within 60 days after entry of the order without notice is a compromise between the provisions of s. 88.25, which provides for appeal within 30 days after entry of the order without notice to the parties, and the provisions of s. 89.15, which also provides for appeal within 30 days after entry of the order but requires notice of such entry to be given to remonstrants. [Bill 1-A]

See note to 88.03, citing *In re Rocky Run D. Dist.* 184 W 557, 200 NW 384.

**88.10 History:** 1963 c. 572; Stats. 1963 s. 88.10.

**Legislative Council Note, 1963:** This section consolidates and restates ss. 88.22 and 89.05. [Bill 1-A]

**88.12 History:** 1963 c. 572; Stats. 1963 s. 88.12.

**Legislative Council Note, 1963:** This section restates s. 88.21. [Bill 1-A]

**88.13 History:** 1963 c. 572; Stats. 1963 s. 88.13; 1969 c. 276 s. 582 (10).

**Legislative Council Note, 1963:** This section consolidates and restates ss. 88.27 and 89.24 (a) with minor changes. [Bill 1-A]

**88.14 History:** 1963 c. 572; Stats. 1963 s. 88.14.

**Legislative Council Note, 1963:** This section is new, though it finds its inspiration in present s. 89.70. It serves as a type of "safety valve" in that it provides an orderly procedure for settling disputes for which other procedures may not be available. It is not anticipated that it will be used extensively, for most disputes are likely to arise and be settled in the ordinary course of regular drainage proceedings. [Bill 1-A]

**88.15 History:** 1963 c. 572; Stats. 1963 s. 88.15; 1965 c. 70.

**Legislative Council Note, 1963:** This section provides for the transition from the old law to the new. Farm drainages operating under ch. 88 and drainage districts operating under ch. 89 of the 1961 statutes will automatically become drainage districts under the new law on January 1, 1965. Town drains do not automatically become drainage districts under the new law. They may become such districts by complying with subs. (2) and (3). If they do not comply within the time specified in sub. (4), they are dissolved as a matter of law.

There is good reason for making this distinction between farm drainage under ch. 88 and drainage districts under ch. 89 on the one hand and town drains on the other hand. Farm drainages for many years have been operating under a central drainage board much like the board proposed in the new law. In fact, the organizational pattern of drainage districts under the new law follows quite closely that of ch. 88 of the 1961 statutes. Although the organizational pattern of drainage districts under ch. 89 of the 1961 statutes is quite different, those districts nevertheless have operated under close judicial supervision and their records probably are as complete as those of farm drainages under ch. 88. On the other hand, town drains never have had judicial supervision. Records often are incomplete or lost. If these organizations are to operate under new ch. 88, it is important that their records be complete enough to form the basis for their operation as a drainage district under the new law. Subs. (2) to (4) provide an opportunity for them to prove that they meet such qualifications. [Bill 1-A]

**88.16 History:** 1963 c. 572; Stats. 1963 s. 88.16; 1965 c. 70, 252; 1967 c. 346.

**88.17 History:** 1963 c. 572; Stats. 1963 s. 88.17.

**Legislative Council Note, 1963:** To a large extent this section restates present s. 88.04. Ch. 17 of the statutes will govern vacancies and removals. To provide better liaison with the county board, a provision has been added requiring board members to be appointed from a list of names submitted by the county agriculture committee. Provision also has been made for greater flexibility in the pay of

drainage board members by permitting county boards to establish a higher per diem than the \$10 statutory minimum. Finally, a provision has been added authorizing abolition of the drainage board if there no longer are any drainage districts in the county. [Bill 1-A]

A member of a county board or of a county board committee may collect per diem for his services as provided in 59.03 (2) (f) and 59.06 (2), Stats. 1945, and on the same day collect a per diem as a farm drainage board member at the rate prescribed in 88.04 (10). 35 Atty. Gen. 169.

**88.18 History:** 1963 c. 572; Stats. 1963 s. 88.18.

**Legislative Council Note, 1963:** This section is basically a consolidation and restatement of ss. 88.18 and 89.37 (2), (3) and (4) (a). Under the drainage board setup of present ch. 88, the county treasurer serves as treasurer of all drainage districts in the county while under the drainage district setup of present ch. 89 each district has its own treasurer, and the county treasurer must pay over to such district treasurer any moneys belonging to the district. This section adopts the ch. 88 plan. [Bill 1-A]

Under 88.18, Stats. 1923, interest on drainage funds belongs to the drainage district. 14 Atty. Gen. 45.

**88.19 History:** 1963 c. 572; Stats. 1963 s. 88.19.

**Legislative Council Note, 1963:** This is basically a new section, though references to record keeping duties of drainage boards can be found in present ss. 88.04 (8) and 89.23 (5). It is designed to assure the maintenance of accurate, up-to-date records, maintained in a central depository, so that they may be readily available for inspection by interested persons. The office of the clerk of court was selected as the depository because many drainage proceedings will take place in county court, and the records of those proceedings will be filed in his office in any event. [Bill 1-A]

**88.20 History:** 1963 c. 572; Stats. 1963 s. 88.20.

**Legislative Council Note, 1963:** This section is from s. 89.48 (3). [Bill 1-A]

**88.21 History:** 1963 c. 572; Stats. 1963 s. 88.21; 1969 c. 276 s. 582 (10).

**Legislative Council Note, 1963:** This section consolidates various scattered provisions of the present law. Subs. (1) and (2) are not expressly stated in the present law but clearly are implied. See for example ss. 88.26 and 89.23 (8).

Subs. (3) and (4) consolidate and restate parts of ss. 88.26 and 89.24 (c).

The statement in sub. (5) that the board may employ engineers and other assistants is from s. 89.26 (1), and this authority also is implicit in other sections of the present law, such as ss. 88.06 (1) and 88.08 (1). The requirement that the engineers employed be selected from a list approved by the director of engineering is new. It is designed to assure competent engineering assistance in drainage matters.

Sub. (6) consolidates and restates ss. 89.18 and 89.24 (b).

Sub. (7) restates part of s. 88.26.

Sub. (8) is based upon s. 89.29, but the section has been revised and modernized so as to give the drainage board greater flexibility in determining what is in the best interest of the district. The provision declaring roads on spoil banks to be town roads after having been in use for 2 years has been omitted.

Subs. (9) and (10) restate respectively the powers granted to drainage commissioners in ss. 89.58 and 89.66. The procedure for obtaining the court's consent to the exercise of these powers is covered by new s. 88.06. [Bill 1-A]

**88.22 History:** 1963 c. 572; Stats. 1963 s. 88.22; 1969 c. 276 s. 603 (7).

**Legislative Council Note, 1963:** Subs. (1) and (2) restate pertinent provisions of ss. 88.115 and 89.78, respectively. The procedure for obtaining court approval is covered in new s. 88.06.

Sub. (3) is new. Federal funds are available for certain drainage projects, but there are certain prerequisites for obtaining these funds, including the existence of a state agency with powers to contract with the appropriate federal officer or agency. This subsection vests such powers in the drainage board, subject to the approval of the county court. [Bill 1-A]

**88.23 History:** 1963 c. 572; Stats. 1963 s. 88.23.

**Legislative Council Note, 1963:** This section is based upon ss. 88.10 (5), 88.19, 89.34 (4) to (6), and 89.44. The principal change is that the procedure for making assessments for supplemental costs in a drainage district has been divorced from the annual report. This does not mean that a report assessing costs may not be made at the time the annual report is made, but it need not be made at such time and it is not part of the annual report. Another change results from the fact that assessments for costs of maintenance and repair are treated specially in s. 88.63. Consequently, there is not likely to be as great a need for an annual levy of assessments as previously. The proviso in sub. (2) (b) relative to the limitation on the additional assessment which can be made without a hearing also is new. So also is the provision in sub. (3) relative to assessments for cost of repair and maintenance. The latter provision is considered to be a clarification of, rather than a change in, present law. The practice has been to permit assessments for repair and maintenance even though the assessed benefits of the district have been fully encumbered by other assessments. [Bill 1-A]

Where, because of default in the payment of an assessment for the construction of a drainage system, there was a deficiency in the amount necessary to pay the principal and interest on the bonds issued, a further assessment could be made under 89.44 (1) and (2), Stats. 1923, not exceeding the amount of benefits assessed to pay the principal and interest on such bonds. In re Dancy D. Dist. 190 W 327, 208 NW 479.

An order assessing benefits, made in proceedings under the drainage district law to establish a drainage district, is the culmination of a judicial proceeding, and such order may be enforced against a county by any or all of the processes inherent in courts of justice, without following the usual claim procedure. *Marshall Drainage Dist. v. Festge*, 272 W 114, 74 NW (2d) 616.

**88.24 History:** 1963 c. 572; Stats. 1963 s. 88.24.

**Legislative Council Note, 1963:** This section is based upon ss. 88.19, 89.23 (9), and 89.35 (4) to (6). Since the levying of assessments no longer will be an integral part of the annual report, there is no need to require a hearing on the report. See the note following s. 88.23. [Bill 1-A]

**88.27 History:** 1963 c. 572; Stats. 1963 s. 88.27.

**Legislative Council Note, 1963:** Sub. (1) restates part of s. 88.05 (1) with minor clarifications. Somewhat similar provisions are found in s. 89.19 (1) relating to organization of drainage districts under ch. 89.

Sub. (2) is from s. 89.19 (1). Sub. (3) is from s. 89.19 (2). [Bill 1-A]

Petitioners for the organization of a drainage district under ch. 54, Stats. 1898, have an absolute right to withdraw before the approval of the petition, and a qualified right until final decision upon the commissioners' report. Such right is analogous to that of a plaintiff in an equity action to dismiss his action. Such right is subject to the judgment of the court as to its reasonableness and terms may be imposed thereon. In re Central D. Dist. 134 W 130, 113 NW 675.

Under the drainage district law assessments for benefits should be ratably borne by a life tenant and the remainderman, and the interest of such life tenant who joined in the petition should be counted in determining whether one-half of the owners have signed. So also a vendee in possession of a tract, under a land contract upon which he has made payments, should be counted as a part owner in the proportion of payments to contract price. In re Rocky Run D. Dist. 177 W 524, 188 NW 493.

The drainage laws as enacted in chs. 88 and 89, Stats. 1951, do not allow the creation of a drainage district piecemeal or by gerrymander. In re Jefferson County Farm Drainage, 264 W 339, 59 NW (2d) 655.

**88.28 History:** 1963 c. 572; Stats. 1963 s. 88.28.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates parts of ss. 88.05 (1) and 89.19 (1). Subs. (2) and (3) restate s. 88.05 (1) (g). One change has been made. The present requirement that the petition must state that the benefits will exceed the cost of construction has been changed to require an allegation that the cost of construction will not exceed 75 per cent of the benefits arising from the drainage. The purpose of this change is to provide a cushion of unencumbered assessed benefits against which assessments for supplemental costs can be made. [Bill 1-A]

**88.29 History:** 1963 c. 572; Stats. 1963 s. 88.29; 1965 c. 249.

**Legislative Council Note, 1963:** Sub. (1) restates s. 88.05 (2). Sub. (2) restates s. 88.06 (1); a similar provision is found in s. 89.26 (1). Sub. (3) restates part of s. 88.06 (6).

Sub. (4) substitutes the uniform notice provisions of new s. 88.05 for the provisions found in present ss. 88.06 (2) and (3) and 89.20. While the present provisions differ in detail, the general import of all of them is that owners and mortgagees whose lands may be affected by the organization of the drainage district should be given personal notice. The new provision requires notice by registered mail.

Sub. (5) restates s. 88.06 (4); sub. (6) restates s. 88.06 (5) with minor changes in the method of giving notice. [Bill 1-A]

**88.30 History:** 1963 c. 572; Stats. 1963 s. 88.30; 1965 c. 249; 1969 c. 276 s. 582 (10).

**Legislative Council Note, 1963:** This section restates s. 88.06 (7) and (8). See also s. 89.26 (2). Under the latter section, proceedings to organize a drainage district under ch. 89 could be stopped by an unfavorable report by either the chief engineer, college of agriculture or department of agriculture. [Bill 1-A]

The cost of supplemental tile drains reported under 88.06 (7), Stats. 1923, by the chief engineer of the state and by the college of agriculture as a necessary part of the contemplated drainage system cannot be excluded in determining whether the benefits will exceed the cost. *Kewaunee, G. B. & W. R. Co. v. Brown County F. D. Dist.* 184 W 448, 199 NW 378.

Under 88.06 (7), Stats. 1923, the state chief engineer is required to make report only when land to be benefited by a drain exceeds 200 acres. 12 Atty. Gen. 648.

**88.31 History:** 1963 c. 572; Stats. 1963 s. 88.31; 1969 c. 276 s. 588 (1).

**Legislative Council Note, 1963:** This section restates s. 89.27 (7) to (16), with the exception of s. 89.27 (14) which is adequately covered by ch. 227. The language has been revised so as to state the matter more definitely in terms of application for and issuance of a permit rather than in terms of findings of fact by the commission, and such minor changes have been made as are necessary to integrate the section into new ch. 88. [Bill 1-A]

On navigable waters see notes to sec. 1, art. IX, and notes to sec. 30.10.

Secs. 1379-11 to 1379-31, Stats. 1898, relating to the organization and powers of drainage districts, do not authorize the destruction of a navigable lake or the impairment of the navigability of a river. In re *Dancy D. Dist.* 129 W 129, 108 NW 202.

All waters declared navigable by act of the legislature must be regarded as navigable waters of the state and not subject to impairment under the drainage laws, at least in the absence of express legislative authority conferred upon the drainage commissioners in plain and unambiguous terms. In re *Horicon Drainage Dist.* 136 W 227, 116 NW 12.

Neither a drainage district organized under the drainage district law, nor one operating

solely by the consent of all concerned, has any power to impair or destroy navigable waters. *State v. Adelmeyer*, 221 W 246, 265 NW 838.

**88.32 History:** 1963 c. 572; Stats. 1963 s. 88.32.

**Legislative Council Note, 1963:** This section restates most of s. 88.06 (6). [Bill 1-A]

**88.33 History:** 1963 c. 572; Stats. 1963 s. 88.33.

**Legislative Council Note, 1963:** This section is derived from s. 88.075. That part of s. 88.075 which relates to the stopping of a drainage project in an organized district is covered in s. 88.81; the above section covers only that part of present s. 88.075 which pertains to stopping the organization of a drainage district. The new section also differs from the old in some other respects: (1) For consistency with s. 88.27 relating to petitions for organization of a district, it provides that no owner shall be counted for more than 320 acres; the present section contains no such provision. (2) For consistency with other sections in new ch. 88, it provides for notice by mail to landowners of the proposed district rather than for notice by posting. (3) In lieu of the present provision that landowners in the district are liable for the payment of existing obligations, it requires the persons seeking to stop the organization to pay all expenses incurred to date. [Bill 1-A]

Under 88.075 (1), Stats. 1929, landowners may interpose opposition when advised that drainage proceedings are under way and that their lands will be included, and the court must order cessation of drainage work and expense on finding that sufficient owners have signed the objectors' petition and that notice of hearing was properly given. In re *Proposed Farm Drainage*, 207 W 338, 241 NW 347.

When work on drainage proceeding is stopped under provisions of 88.075, Stats. 1929, the cost and expense incurred up to time of such stopping should be apportioned upon property assessed in proportion to such assessments and collected in the same way it would be if work had not been stopped. 18 Atty. Gen. 638.

**88.34 History:** 1963 c. 572; Stats. 1963 s. 88.34.

**Legislative Council Note, 1963:** This section is largely a consolidation and restatement of various provisions of present chs. 88 and 89, with a few changes to be noted.

Sub. (1) is based upon ss. 88.06 (9) and 89.27 (1) and (2). The uniform notice provisions of new s. 88.05 have been incorporated in lieu of the notice provisions of the present law which are similar to the new provisions in general scope but differ from them in various details.

Sub. (2) restates s. 88.06 (10).

Sub. (3) restates s. 88.07 (1) and parts of s. 89.27. The present provision that the cost of construction must not exceed the benefits has been changed to provide that the cost of construction must not exceed 75 per cent of the total benefits accruing from the proposed drainage. The purpose of this change is to provide a cushion of unencumbered assessed benefits against which assessments for supplemental costs can be made.

Subs. (4) and (5) are from s. 88.07 (2); sub. (6) restates s. 88.07 (3).

Sub. (7) consolidates and restates s. 89.08 (1) and part of s. 88.20 (1). Sub. (8) restates s. 89.19 (4) with such changes in wording as are necessary to reflect the change noted in connection with sub. (3) above.

Sub. (9) is new. It replaces the *lis pendens* provisions found in present ss. 88.03 (5) and 89.11. [Bill 1-A]

Drainage districts are created to promote public health or welfare and for the drainage of land; they are invalid if created for the sole purpose of draining land. *Cranberry Creek D. Dist. v. Elm Lake C. Co.* 170 W 362, 174 NW 554.

**88.35 History:** 1963 c. 572; Stats. 1963 s. 88.35; 1965 c. 249; 1969 c. 276 s. 582 (10).

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates parts of ss. 88.08 (1) and 89.28 (1).

Sub. (2) is from ss. 88.08 (1) (a) and 89.28 (2).

Sub. (3) restates most of the last sentence of s. 89.28 (2). Sub. (4) restates part of s. 88.08 (1) (b) and sub. (5) restates s. 88.08 (3).

Sub. (6) consolidates and restates s. 88.08 (2) and parts of ss. 88.08 (1) (h) and 89.28 (1). Sub. (7) restates the last sentence of s. 88.08 (1) (h). A similar provision is found in s. 89.28 (3), but that provision differs from the one found in s. 88.08 (1) (h) in that it makes the approval of the state chief engineer (now director of engineering) a condition precedent to further proceedings in the development of the proposed drainage works. [Bill 1-A]

Under secs. 1363 and 1364, Stats. 1898, before an attempt is made to apportion the expense of construction among those benefited, there must be a determination of the amount of damage to the lands through which the drain runs. *Fraser v. Mulany*, 129 W 377, 109 NW 139.

One drainage district may be assessed for benefits which it derives from another district. The fact that certain land in such first district is not benefited does not prevent such assessment as the cost may be apportioned by the commissioners of such first district. The district is a body corporate. In a proper case it may assess an adjoining district, but not the landowners thereof. Such district assessment must be apportioned to the landowners of the assessed district by its commissioners, not equally, but according to benefits. The landowners of a district need not be made parties to a proceeding to assess the district. *Rattlesnake Dist. v. Koshkonong Dist.* 150 W 223, 136 NW 631.

The drainage district law (secs. 1379-10a to 1379-40, Stats. 1919) clearly contemplates that the expenditures and cost of construction of a drainage district shall not exceed the amount of the assessed benefits. *McMahon v. Lower Baraboo River D. Dist.* 184 W 611, 200 NW 366.

The legislature conceived of the assessment of benefits as a security fund for construction, repair or maintenance. *In re Dancy D. Dist.* 190 W 327, 208 NW 479.

In view of 88.08, Stats. 1925, where no assessment of benefits has been made, any expenditure to widen and deepen a ditch is

barred. *In re Heideman D. Dist.* 192 W 458, 212 NW 288.

**88.36 History:** 1963 c. 572; Stats. 1963 s. 88.36.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates ss. 88.08 (4) and 89.32. Sub. (2) restates part of s. 88.09 and also covers s. 89.33 (1).

Sub. (3) restates s. 89.33 (2). Sub. (4) consolidates and restates s. 89.33 (3) and part of s. 88.09.

Sub. (5) consolidates and restates parts of ss. 88.09 and 89.34 (1). Sub. (6) restates s. 89.34 (3) with a change in wording necessary to reflect the change discussed in connection with s. 88.34 (3). Note that "cost of construction" is defined in s. 88.01. [Bill 1-A]

Where, under sec. 1379-18, Stats. 1898, as amended, the court made an order denying a motion of petitioners to confirm the report and also denying the motion of the objectors to dismiss the proceeding, the order was appealable. *Knoller v. Dobrath*, 129 W 129, 108 NW 202.

"The establishment of a drainage district properly made by the court conclusively establishes that all the lands included will be benefited and that the aggregate of such benefits will exceed the damages and cost of construction. It is not contemplated that assessments should be collected up to the amount of the benefits derived, except where absolutely necessary to complete the public improvement. The order creating the district is final and conclusive on the propositions that the proposed drainage district is a public improvement, that the public welfare and health will be advanced by its creation, and that it is established under the law as a drainage district." *Ward v. Babcock*, 162 W 539, 542, 156 NW 1007, 1009.

The drainage district law (secs. 1379-10a to 1379-40, Stats. 1919) clearly contemplates that the expenditures and cost of construction of a drainage district shall not exceed the amount of the assessed benefits. *McMahon v. Lower Baraboo D. Dist.* 184 W 611, 200 NW 366.

**88.40 History:** 1963 c. 572; Stats. 1963 s. 88.40.

**Legislative Council Note, 1963:** This section consolidates and restates ss. 88.10 (1), 89.23 (8), the second sentence of 89.35 (2), and 89.38. [Bill 1-A]

**88.41 History:** 1963 c. 572; Stats. 1963 s. 88.41.

**Legislative Council Note, 1963:** For the most part, this section relating to payment of assessments for costs consolidates and restates provisions of present chs. 88 and 89. A change has been made in sub. (4) in that a 60-day grace period for paying assessments has been provided. Interest is waived if the assessment is paid within this 60-day period. There is no similar provision in the present law. Provisions also have been added to make clear that drainage assessments are to be paid to the county treasurer who acts as treasurer of all drainage districts in the particular county.

Aside from the changes and clarifications noted above, this section consolidates and re-

states present law, as follows: Sub. (1) covers part of s. 88.10 (2) and the first sentence of s. 89.35 (2). It also covers s. 89.09 (2) which states a rule inconsistent with s. 89.35 (2). Sub. (2) consolidates and restates part of ss. 88.10 (2), 88.10 (3) and part of 89.35 (1). Sub. (3) restates s. 89.35 (3). Sub. (4) consolidates and restates parts of ss. 88.10 (4), 89.09 (1) and (4) and 89.35 (1) and (3). It omits the provision of s. 89.09 (4) which stated that the rate of interest must be the same as the rate of interest on district obligations which are based on the assessments. [Bill 1-A]

**88.42 History:** 1963 c. 572; Stats. 1963 s. 88.42.

**Legislative Council Note, 1963:** Sub. (1) consolidates and revises s. 88.13 and part of s. 89.36 (1). The provision for computing interest through December 31 of the current year is new. In part it is intended to be an incentive for prompt payment and in part it is intended to make up for revenue lost to the district because of the fact that interest does not accrue during the period when the assessments are in the process of being collected as taxes by the town, village or city treasurer.

Sub. (2) consolidates and restates parts of ss. 88.14 (1) and 89.36 (1).

Sub. (3) consolidates and restates ss. 88.14 (3) and 89.36 (2) and (3).

Sub. (4) consolidates and restates s. 89.36 (4) and part of s. 88.18 with such minor changes in wording as are made necessary by the fact that the county treasurer will serve as treasurer of all drainage organizations in the county. [Bill 1-A]

**88.43 History:** 1963 c. 572; Stats. 1963 s. 88.43.

**Legislative Council Note, 1963:** Subs. (1) and (2) are from ss. 88.14 (1) and 89.37 (1). Sub. (3) covers s. 89.37 (5) and part of s. 88.14 (1). The statement in the present sections that "no tax deed shall cut off any drainage assessment" has been omitted on the ground it does not correctly state the law. See *In re Dancy Drainage District*, 199 Wis. 85, 95, 225 NW 873 (1929).

Sub. (4) consolidates and restates ss. 88.14 (2) and 89.37 (6).

Sub. (5) consolidates and restates s. 89.37 (4) (b) and (c) as construed in *Lewiston Drainage District v. Diehl*, 227 Wis. 372, 279 N.W. 45 (1938). That case held that s. 89.37 (4) (b) refers to a county's bidding in lands at a tax sale under s. 74.44 and that s. 89.37 (4) (c) refers to a county's bidding in lands at a tax sale under s. 74.42 and that in either case the county holds the drainage assessment certificates thus acquired merely as trustee.

Sub. (6) restates s. 89.37 (4) (d) with some minor changes and additions. The 3-year period in sub. (6) (a) has been substituted for the reference in s. 89.37 (4) (d) to "the period prescribed by statutes relating to general taxation." There does not seem to be any good reason for stating a different period here than in sub. (3), relating to issuance of drainage assessment deeds generally. Moreover, the reference in s. 89.37 (4) (d), quoted above, is ambiguous in view of the fact that s. 75.01 of the statutes now provides that lands sold for taxes may be redeemed any time prior to the

recording of the tax deed, which may be 11 years after issuance of the tax sale certificate (s. 75.20), while in another sense the redemption period is 3 years, since that is the minimum waiting period before a tax deed may be issued (s. 74.46).

The last sentence of sub. (6) (a) is new, but it represents a practice approved in *In re Wood County Drainage District*, 201 Wis. 368, 230 N.W. 57 (1930). The notice provisions of sub. (6) (b) have been changed by eliminating the requirement of posting. [Bill 1-A]

Under sec. 1379-25 (5), Stats. 1919, the provisions relating to penalties in the case of delinquent general taxes apply to the collection of drainage assessments. The word "principal," in 1379-25a, relating to drainage district accounts, includes penalties, and the word "interest" means the interest on certificates from the date of the sale to the county, to the date of the deed. Those penalties belong to the drainage district, not to the county. State ex rel. Portage County D. Dist. v. Newby, 169 W 208, 171 NW 953.

A bondholder is not required to exhaust his remedy against the delinquent lands under 89.37 (4) (d), Stats. 1927, before an additional assessment under 89.44 (1) and (2) can be made. A county taking a tax deed to land in a drainage district extinguished general taxes represented by tax certificates. A lien for general taxes is superior to drainage assessments, which is a special assessment lien. In re Dancy D. Dist. 199 W 85, 225 NW 873.

A county could petition for sale of drainage land for delinquent general taxes and drainage assessment regardless of its interest in drainage certificates. In re Wood County D. Dist. 201 W 368, 230 NW 57.

A drainage assessment lien is a special assessment lien, and therefore a tax lien. The purchase of land at a sale for nonpayment of drainage assessments by a husband of a co-owner, under an agreement that one of the co-owners should occupy the land until her death and that the property should then be divided among the other co-owners, was a purchase by the co-owners and operated as a redemption of the property from the drainage lien by them so that the lien of a pre-existing mortgage was not thereby extinguished. *Bankers Farm M. Co. v. Christofferson*, 221 W 148, 266 NW 220.

Delinquent drainage assessments should be returned at the time and in the manner delinquent taxes are returned, but separately. Town treasurers get no credit for such assessments so returned. When lands are sold for both assessments and taxes, separate certificates should be issued; when but one certificate is issued it should be surrendered to county treasurer and he should issue separate certificates in lieu thereof. 8 Atty. Gen. 783.

Under the farm drainage law, the interest collected by the county treasurer on delinquent assessments goes with the assessments and the penalty collected and belongs to the county. 9 Atty. Gen. 306.

Special assessments under the town drainage law and under the farm drainage law are to be placed on the tax roll, if not paid when due, and collected as taxes are collected. 11 Atty. Gen. 271.

A town treasurer may legally accept pay-

ment of the general tax on land, leaving unpaid thereon a drainage assessment which the taxpayer declines to pay. 13 Atty. Gen. 157.

Under 88.14, Stats. 1923, it is not necessary that lands upon which both general taxes and drainage assessments are delinquent be advertised for sale separately. 14 Atty. Gen. 143.

Drainage assessment certificates held by a county under 89.37 (4) (b), Stats. 1927, may not be sold at less than their face value. 16 Atty. Gen. 433.

Where lands upon which a county holds drainage assessment certificates are sold at public auction by order of a court, the county may not be the purchaser if it merely holds drainage assessment certificates, but the county may be the purchaser if it holds a drainage deed or tax deed. The words "any unpaid general taxes due the county" as used in 87.37 (4) (d), Stats. 1931, include all general taxes remaining unpaid upon lands sold thereunder. 20 Atty. Gen. 307.

A county may take a tax deed without paying up drainage assessment certificates but such certificates may be foreclosed and the land sold, and from the proceeds of sale unpaid general taxes are first to be paid. 20 Atty. Gen. 964.

A county may be the purchaser at a sale of land which is subject to drainage assessments held pursuant to 87.37 (4) (d), Stats. 1935, if such county holds general property tax certificates upon the land to be sold. 26 Atty. Gen. 20.

A county owning and holding unredeemed drainage assessment certificates may apply for sale of the property under 87.37 (4) (d), Stats. 1939, whether or not it has taken a deed on its general tax certificates. If it has taken such deed, proceeds of sale should be first applied to payment of drainage district assessments. 30 Atty. Gen. 47.

A tax deed taken on a general tax certificate does not cut off the lien of drainage district certificates. Owners in a drainage district who have paid additional assessments because other owners have defaulted are subrogated to the rights of creditors and bondholders under 87.37 (4) (d), Stats. 1945. 35 Atty. Gen. 335.

**88.44 History:** 1963 c. 572; Stats. 1963 s. 88.44.

**Legislative Council Note, 1963:** Subs. (1) and (2) are from s. 89.41; sub. (3) restates s. 89.46. [Bill 1-A]

**88.45 History:** 1963 c. 572; Stats. 1963 s. 88.45.

**Legislative Council Note, 1963:** This section is substantially a restatement of s. 89.45. [Bill 1-A]

**88.46 History:** 1963 c. 572; Stats. 1963 s. 88.46.

**Legislative Council Note, 1963:** This section is substantially a consolidation and restatement of ss. 88.105 and 89.62. [Bill 1-A]

**88.47 History:** 1963 c. 572; Stats. 1963 s. 88.47.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates ss. 88.24 and 89.55. Sub. (2) is new. Its purpose is to provide a

method whereby a landowner who is dissatisfied with the apportionment of the assessment may have the controversy determined in court. [Bill 1-A]

**88.48 History:** 1963 c. 572; Stats. 1963 s. 88.48.

**Legislative Council Note, 1963:** Sub. (1) restates s. 89.30, with the addition of a reference to towns, villages and cities. It is clear that towns, villages and cities are subject to drainage assessments under present law, and the added reference merely has the effect of making clear how notice of hearings on assessments are to be served. Sub. (2) restates s. 89.56. [Bill 1-A]

A county charged with the maintenance of a highway system within a drainage district is deemed to be benefited by the drainage of the lands on which such highways are located, and the drainage district has the power, under ch. 89, Stats. 1953, to assess the county for such benefits. *Marshall D. Dist. v. Festge*, 272 W 114, 74 NW (2d) 616.

**88.49 History:** 1963 c. 572; Stats. 1963 s. 88.49.

**Legislative Council Note, 1963:** This section restates s. 89.61. [Bill 1-A]

**88.50 History:** 1963 c. 572; Stats. 1963 s. 88.50.

**Legislative Council Note, 1963:** This is basically a new section, though it restates present law in its provision that state-owned lands are not subject to assessment in drainage proceedings. See 30 Op. Atty. Gen. 234 (1941). Present law does not deal with the problem to which sub. (2) is addressed, except insofar as s. 89.31 states that the commissioners of public lands shall grant permission for drains to cross state lands. [Bill 1-A]

Special assessment may not be imposed by drainage districts, under sec. 1379-18, Stats. 1919, upon lands owned by the state. 9 Atty. Gen. 534. See also 30 Atty. Gen. 234.

**88.54 History:** 1963 c. 572; Stats. 1963 s. 88.54; 1965 c. 252.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates ss. 88.04 (11) and 89.47 (1), omitting the provision of s. 89.47 (1) that the notes shall not run for more than 2 years or bear interest at a rate of more than 6 per cent per annum.

Sub. (2) consolidates and restates ss. 88.12 and 89.47 (2). In lieu of the maximum interest rate specified in the present law (6 per cent per annum), sub. (2) seeks to provide flexibility in financing by permitting the rate to be set in each case subject to the approval of the court. Sub. (3) restates s. 89.47 (3) and sub. (4) restates s. 89.47 (4).

Sub. (5) restates s. 89.47 (5), except the last sentence thereof which appears to be obsolete. While this is not entirely clear, it appears that the provisions of present s. 89.47 (5) (restated in sub. (5) above) are intended to be applicable only to emergency loans under s. 89.47 (4) (restated in sub. (4) above). Section 89.47 (5) has been so restated herein.

Sub. (6) restates s. 89.47 (8) but omits the requirement that the evidences of indebtedness be approved by the commissioner of banks,

state department of agriculture and state chief engineer. Sub. (7) restates s. 89.23 (6). [Bill 1-A]

**88.55 History:** 1963 c. 572; Stats. 1963 s. 88.55.

**Legislative Council Note, 1963:** This section restates s. 89.47 (6) and (7). The substance of the provisions of this section was construed in *In re Beaver Drainage District*, 244 Wis. 603, 14 N.W.2d 181 (1944), in which case the court held that the exchange of first issue bonds for refunding bonds under this section merely extends the time of payment of the original obligation rather than creates an entirely new one, and the holder of the refunding bonds therefore retains the advantage of the prior lien of the original bonds. A more flexible provision with regard to rate of interest has been inserted. See the NOTE following s. 88.54. [Bill 1-A]

**88.56 History:** 1963 c. 572; Stats. 1963 c. 88.56; 1965 c. 252.

**Legislative Council Note, 1963:** This section restates s. 89.80. A change has been made in the notice provisions of sub. (3) so as to bring them into conformity with the uniform notice provisions of new s. 88.05. [Bill 1-A]

Where a drainage district is unable to pay its bonds and other obligations in full and has exhausted its power to levy further assessments, proceedings, in the nature of a winding-up action, for the allowance of claims and the distribution of assets should be brought under and in accordance with the procedure prescribed by 89.80, Stats. 1941. *In re Beaver D. Dist.* 244 W 603, 13 NW (2d) 76.

**88.62 History:** 1963 c. 572; Stats. 1963 s. 88.62; 1965 c. 252.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates part of s. 88.09 and s. 89.48 (1) and (2). The requirement that all work costing more than \$2,000 be let on competitive bids is from s. 89.48 (1) and is not expressly stated in ch. 88. Sub. (2) restates s. 89.49. [Bill 1-A]

Where a contractor defaulted and the district had the job completed under a new contract without competitive bidding, the surety of the first contractor cannot avoid liability since the defense of ultra vires is not available to it. *Center D. Dist. v. Capitol Indemnity Corp.* 33 W (2d) 294, 147 NW (2d) 245.

**88.63 History:** 1963 c. 572; Stats. 1963 s. 88.63.

**Legislative Council Note, 1963:** This is basically a new section. The only reference to maintenance of drains in the present law is a statement in s. 88.19 (3) that the drainage board, with the approval of the court, may make necessary repairs to drains, a statement in s. 88.26 that the drainage board has the power to protect and maintain all drains under its jurisdiction, and a reference in s. 88.31 to maintenance of town drains by the landowners to whom the drains or particular segments thereof were assigned for maintenance. In addition, ss. 88.33 to 88.36 set up a procedure for removal of obstructions from town drains.

This new section is based on the assumption that regular, routine maintenance work

is important in eliminating the need for expensive clean out and reconstruction work at longer intervals. To this end, the section seeks to provide a simplified method for raising funds for repair and maintenance while at the same time preserving the rights of landowners to have a court review of the legality of the board's actions. [Bill 1-A]

**88.66 History:** 1963 c. 572; Stats. 1963 s. 88.66.

**Legislative Council Note, 1963:** This section consolidates and restates ss. 88.16 (1) and 89.43 (1) to (6). Some obsolete material has been eliminated. The provision in sub. (3) requiring consultation with the drainage board when a culvert is replaced or a roadbed constructed or reconstructed across a drain is new. [Bill 1-A]

A railway company may recover by action against a drainage district the cost of opening its right of way, in compliance with sec. 1379-29, Stats. 1911, to permit the passage of a drainage ditch and the dredges used in constructing it. *Chicago, M. & St. P. R. Co. v. Shepard D. Dist.* 163 W 385, 158 NW 95.

A proceeding to require removal of struts under a culvert was properly brought under 89.65, Stats. 1927, requiring railway companies to enlarge obstructed natural waterways. *Lemonweir River D. Dist. v. Chicago, M., St. P. & P. R. Co.* 199 W 46, 225 NW 132.

**88.67 History:** 1963 c. 572; Stats. 1963 s. 88.67.

**Legislative Council Note, 1963:** Consolidates and restates ss. 88.16 (2) and 89.43 (7) and (8). The forfeiture in sub. (2) was increased from \$10 to \$25 per day so as to conform to the forfeiture specified in s. 88.66. [Bill 1-A]

**88.68 History:** 1963 c. 572; Stats. 1963 s. 88.68.

**Legislative Council Note, 1963:** Sub. (1) restates s. 88.17. Subs. (2) and (3) consolidate and restate ss. 88.15 and 89.57. Some obsolete material has been eliminated. Sub. (4) is new. [Bill 1-A]

Where a drainage district constructs a ditch under an existing highway bridge, resulting in undermining of the bridge through increased water flow so as to make construction of a new bridge necessary, the drainage district is obligated to pay for such cost only to the extent and in the manner provided by 89.57 (1) (a) and (b), Stats. 1943. 33 Atty. Gen. 169.

**88.69 History:** 1963 c. 572; Stats. 1963 s. 88.69.

**Legislative Council Note, 1963:** Sub. (1) consolidates and restates ss. 88.23 and 89.53. Sub. (2) restates s. 89.54 with 2 minor changes: (a) the requirement that the agreement as to the increased cost must have court approval has been eliminated; and (b) the requirement that the action to recover the amount of the increased cost must be tried without a jury has been eliminated. [Bill 1-A]

**88.70 History:** 1963 c. 572; Stats. 1963 s. 88.70.

**Legislative Council Note, 1963:** This sec-

tion restates s. 89.59 with minor changes and clarifications. [Bill 1-A]

**88.71 History:** 1963 c. 572; Stats. 1963 s. 88.71.

**Legislative Council Note, 1963:** This section restates ss. 89.39 and 89.40 with minor revisions and clarifications. [Bill 1-A]

**88.72 History:** 1963 c. 572; Stats. 1963 s. 88.72; 1965 c. 614 s. 57 (2g); 1969 c. 276 s. 588 (6).

**Legislative Council Note, 1963:** This section restates most of s. 89.63 with minor changes and clarifications. [Bill 1-A]

**88.73 History:** 1963 c. 572; Stats. 1963 s. 88.73.

**Legislative Council Note, 1963:** This section restates part of s. 88.11 and also covers s. 89.50. The latter section provided a somewhat different procedure than s. 88.11 for achieving the same objective. [Bill 1-A]

**88.77 History:** 1963 c. 572; Stats. 1963 s. 88.77.

**Legislative Council Note, 1963:** This section restates that part of s. 88.11 not covered by s. 88.73. This section also covers s. 89.51. [Bill 1-A]

**88.78 History:** 1963 c. 572; Stats. 1963 s. 88.78.

**Legislative Council Note, 1963:** This section restates s. 89.52 with minor clarifications and changes. New sub. (1) is based upon the interpretation given this section in *In re Jefferson County Farm Drainage*, 264 Wis. 339, 59 N.W. 2d 655 (1953), where the court held that this section does not apply to a situation which constitutes a conscious gerrymander, but applies only to a situation where lands were omitted originally unintentionally and it later becomes apparent that such lands were directly affected. In sub. (4) the uniform provisions of new s. 88.06 have been incorporated in lieu of previous procedure. [Bill 1-A]

The facts in the instant case compel the conclusion that a drainage board, when originally creating a drainage district, was fully advised that the plaintiffs' lands now sought to be included were directly affected and within the area benefited, as were intervening lands subsequently brought in, and that the proceedings resorted to by the board constituted a conscious attempt to create a district piecemeal, which, although in good faith, was contrary to the drainage statutes and void as to the plaintiffs, complaining of the addition of their lands to the existing district. *In re Jefferson County Farm Drainage*, 264 W 339, 59 NW (2d) 655.

**88.79 History:** 1963 c. 572; Stats. 1963 s. 88.79.

**Legislative Council Note, 1963:** This section consolidates and restates ss. 88.20 (1) and 89.60. A reference to the notice provisions of s. 88.05 has been incorporated. [Bill 1-A]

**88.80 History:** 1963 c. 572; Stats. 1963 s. 88.80.

**Legislative Council Note, 1963:** Restates s. 88.117. [Bill 1-A]

**88.81 History:** 1963 c. 572; Stats. 1963 s. 88.81.

**Legislative Council Note, 1963:** This section is derived from s. 88.075. Another part of s. 88.075 is covered by new s. 88.33. The above section makes some changes in the law: (1) It applies to all drainage organizations whereas the present section applies only to farm drainages operating under ch. 88 of the 1961 statutes. (2) For consistency with other sections in new ch. 88, it provides for notice by mail to landowners of the district rather than for notice by posting. (3) It adds a condition to the suspension of operations of a district, namely, that the petitioners for suspension pay the expenses of the hearing under this section and all expenses incurred in connection with specific current projects whose completion would be affected by the order of suspension. [Bill 1-A]

**88.82 History:** 1963 c. 572; Stats. 1963 s. 88.82.

**Legislative Council Note, 1963:** This section restates s. 89.665 with minor changes and clarifications. In sub. (1) the uniform notice provisions of new s. 88.05 have been substituted for the previous posting and publication provisions. Also, for the sake of consistency with s. 88.81, the requirement that the petition be signed by the owners of land representing a majority of the confirmed benefits has been substituted for the previous requirement that the petition must be signed by the owners of more than one-half of the lands assessed benefits. In sub. (5) a maximum fine of \$100 has been substituted for the \$1 to \$25 first offense fine and \$10 to \$100 subsequent fine stated in the present section. [Bill 1-A]

The dissolution of drainage districts on the petition of the owners of lands assessed for more than half of the confirmed benefits, whenever the indebtedness thereof is paid or provided for, is valid. *Koshkonong Mud Creek D. Dist. v. Bodeman*, 197 W 261, 221 NW 864.

**88.83 History:** 1963 c. 572; Stats. 1963 s. 88.83; 1965 c. 128; 1967 c. 71.

**Legislative Council Note, 1963:** This section restates s. 89.669 with some changes and clarifications; (1) The scope of the section has been broadened to encompass transfer to village jurisdiction; the present section pertains only to transfers to city jurisdiction. (2) The uniform notice provisions of s. 88.05 have been substituted for previous posting and publication requirements. (3) It has been made clear that the district must be located entirely within the corporate limits of the city or village to which jurisdiction is to be transferred; present law is not clear on this point. [Bill 1-A]

**88.87 History:** 1963 c. 572; Stats. 1963 s. 88.87; 1969 c. 500 s. 30 (2) (e).

**Legislative Council Note, 1963:** This section is a consolidation and revision of ss. 88.38 and 88.40. It makes several changes in the law. It recognizes that, under modern methods of highway construction, it is impossible to maintain the free and unobstructed flow and percolation of water as required by present s. 88.38. It therefore substitutes the

requirement that sound engineering practices be employed and that the flow of surface or stream water not be impeded in any unreasonable manner so as to cause any unnecessary accumulation of water. It repeals the provisions which, under s. 88.38 (1), gave the landowner a right to bring repeated actions for damages for flooding or water-soaking of lands located on the upper side of the highway and, under s. 88.38 (1m), for flooding or water-soaking lands located on the lower side of the highway. Instead, the landowner will be required either to sue for equitable relief or to bring an action of inverse condemnation to recover compensation for the taking of the land by flooding or water-soaking. The section also imposes a duty upon the landowner to refrain from impeding or diverting surface or stream water in such a way as to cause damage to or flooding of highways. The present section only imposes duties upon the highway authorities and fails to impose any such correlative duty upon landowners. [Bill 1-A]

Sec. 1388b, Stats. 1913, gives a new right and provides a specific remedy to enforce the same. The remedy, an action at law for damages, is exclusive. Failure of a town to perform the duty imposed does not constitute a nuisance cognizable by equity. A claim for damages against a town must be filed as provided by sec. 824 before action thereon. Knapp v. Deer Creek, 162 W 168, 155 NW 940.

An order of the railroad commission requiring a railroad company to construct an opening through an embankment was unreasonable under the circumstances, 88.38 (2), Stats. 1925, giving the owner a remedy. Chicago, B. & Q. R. Co. v. Railroad Comm. 199 W 342, 226 NW 286.

The county is not liable for damages caused by the flooding of lands by waters which accumulated thereon because of the inadequacy of the culvert under the road bed of a federal-state highway. Leininger v. Pierce County, 226 W 515, 277 NW 187.

In connection with a question submitted as to the sufficiency of the drain in question, an instruction that under 88.38, Stats. 1937, the county, when constructing a highway across any natural depression over which surface water naturally flows, is required to provide drains which are sufficient to conduct away in safety the rainfall of ordinary storms, but is not required to provide against any extraordinary rainfall or unusual freshet such as occurs but once in a series of years and which persons of ordinary prudence would not think of guarding against, was correct. Thurs Box Co. v. Marathon County, 233 W 387, 289 NW 691.

88.38, Stats. 1939, did not apply where a pond, although it was a surface-water pond in which was collected the moisture from the drainage area in question, overflowed because of an abnormal condition, occurring only 3 times in 28 years, which resulted from the freezing of the ground at the bottom of the basin rather than from the falling of the rain or the melting of the snow; hence the public service commission should not have proceeded under this section but should have proceeded under applicable 88.39. Thomson

v. Public Service Comm. 241 W 243, 5 NW (2d) 769.

An instruction to the jury that it was not the duty of the town to provide for drainage of floodwaters from a river which seasonally overflowed the plaintiff's land, but that after such floodwaters had receded the plaintiff had the right to the maintenance of drainage that would permit the percolation, seepage, and runoff of the resulting saturating waters to the same extent and in the same manner that such waters were drained off before the construction of the intersecting town roads, was correct. Huerth v. Prairie du Sac, 252 W 102, 31 NW (2d) 187.

Plaintiff's land abutting a town road lay at a lower level so that the natural drainage of surface water from land on the opposite side of the road was toward the plaintiff's land. Where the effect of the defendant town's failure to maintain a ditch was merely to restore the flow to the original course before the road was built, such failure did not stop or divert the natural flow of the surface water so as to entitle the plaintiff to damages under 88.38, Stats. 1947. This section was intended to give a measure of relief to the owner of the upland from the rule of the common law. Gibeau v. Pratt, 256 W 617, 42 NW (2d) 286.

Failure to maintain ditches and culverts creates a liability only when such failure obstructs the natural flow of surface waters, and not where the ditch in question was dug to cause an unnatural flow. Lloyd v. Chippewa County, 265 W 293, 61 NW (2d) 479, 62 NW (2d) 431.

A railroad company need not maintain a culvert or provide substitute drainage facilities where a filling in of the land on one side by the adjoining landowner prevents drainage through the culvert and in fact reverses the flow. Laur v. Chicago & N. W. R. Co. 1 W (2d) 567, 85 NW (2d) 353.

88.38, Stats. 1955, applies only to injuries to adjacent lands, and imposes no municipal liability for personal injuries allegedly resulting from such a failure, but the allegations of the complaint that the contamination of a well on the family premises, and the illness resulting from drinking the contaminated water, were caused solely and proximately by the creation of a continuing nuisance through the defendant town's violation of the statute, in connection with improving a town road, were sufficient to state a cause of action based on nuisance, as against a general demurrer to the complaint. Stockstad v. Rutland, 8 W (2d) 528, 99 NW (2d) 813.

88.87, Stats. 1965, which superseded 88.38, Stats. 1963, affords the property owner a right of action in inverse condemnation under ch. 32 or a suit for other relief in lieu of a cause of action for damages arising from such obstruction. Niesen v. State, 36 W (2d) 671, 154 NW (2d) 316.

"The new statute (88.87) in effect, establishes the requirement that sound engineering practices be employed in highway construction and that the flow of surface water not be impeded in any unreasonable manner so as to cause any unnecessary accumulation of water." Niesen v. State, 36 W (2d) 671, 677, 154 NW (2d) 316, 319.

In an inverse condemnation action, by the owner of a farm, to recover damages for injuries allegedly caused by installation of a culvert and landfill for road improvement, claimed to have disrupted the drainage and caused flooding or water-soaking of part of the land, credible evidence (albeit disputed), supported the trial court's findings which supported the conclusion that there was no occupying of the lands by the town without having the right to do so. *Novak v. Agenda*, 44 W (2d) 644, 172 NW (2d) 38.

Neither the county, town nor state is liable for damages resulting from faulty drainage of surface water, where a road was reconstructed by the state. 29 Atty. Gen. 378.

Rights in cases of flood damage. *O'Brien*, 1963 WLR 649.

**88.88 History:** 1963 c. 572; Stats. 1963 s. 88.88.

**Legislative Council Note, 1963:** Consolidates and restates s. 88.39 and part of s. 88.40. [Bill 1-A]

**88.89 History:** 1963 c. 572; Stats. 1963 s. 88.89.

**Legislative Council Note, 1963:** This section restates s. 89.65. [Bill 1-A]

89.65, Stats. 1927, requiring railway companies to enlarge natural waterways obstructed by culverts; merely declares the common-law rule. *Lemonweir River D. Dist. v. Chicago, M., St. P. & P. R. Co.* 199 W 46, 225 NW 132.

The duty of counties and towns to reconstruct bridges over natural watercourses where the bridges have become too small to accommodate the increased flow resulting from artificial drainage is discussed in 9 Atty. Gen. 268.

**88.90 History:** 1963 c. 572; Stats. 1963 s. 88.90.

**Legislative Council Note, 1963:** Restates s. 88.41. [Bill 1-A]

88.41, Stats. 1937, does not apply to a watercourse which drains surface waters only, notwithstanding it formerly drained spring water, such watercourse not being a "natural watercourse" within the meaning of the statute. 26 Atty. Gen. 344.

**88.91 History:** 1963 c. 572; Stats. 1963 s. 88.91.

**Legislative Council Note, 1963:** Consolidates and restates s. 89.69 and most of s. 88.32. Part of s. 88.32 is covered by the general statute on criminal damage. [Bill 1-A]

**88.92 History:** 1963 c. 572; Stats. 1963 s. 88.92.

**Legislative Council Note, 1963:** Restates s. 89.42, except that a fine of not more than \$50 has been substituted for the \$5 to \$25 fine of the present section. [Bill 1-A]

**88.93 History:** 1963 c. 572; Stats. 1963 s. 88.93.

**Legislative Council Note, 1963:** This section restates s. 89.64 with minor clarifications. [Bill 1-A]

**88.94 History:** 1963 c. 572; Stats. 1963 s. 88.94.

**Legislative Council Note, 1963:** This section revises and restates s. 88.42. One change results from the fact that the petition is to go to the drainage board if there is one in the county; the present section provides for petitions only to the town board. Because of the ambiguity of present s. 88.42 which results from its cross reference to s. 89.50, it is difficult to state what other substantive changes, if any, result from the revision. The new section, however, makes clear that lands of others are not to be assessed for costs even though benefited by the drain. Benefits to other lands are to be assessed solely for the purpose of using them to offset damages which may be caused to lands of others by the construction of the drain. This may be a change in the law. [Bill 1-A]

## CHAPTER 90.

### Fences.

**90.01 History:** R. S. 1858 c. 17 s. 20; 1872 c. 41; 1875 c. 285; R. S. 1878 s. 1389; 1895 c. 14; Stats. 1898 s. 1389; 1923 c. 204 s. 1a; Stats. 1923 s. 90.01.

**90.02 History:** 1905 c. 374 s. 1; Supl. 1906 s. 1390a; 1907 c. 91; 1923 c. 204 s. 4; 1923 c. 276 s. 1, 3; 1923 c. 449 s. 35; Stats. 1923 s. 90.02; 1951 c. 110; 1963 c. 286.

**90.03 History:** R. S. 1849 c. 14 s. 2; R. S. 1858 c. 17 s. 2, 9; R. S. 1878 s. 1391; 1880 c. 138; 1880 c. 307; Ann. Stats. 1889 s. 1391; Stats. 1898 s. 1391; 1915 c. 618; 1923 c. 204 s. 5; Stats. 1923 s. 90.03; 1935 c. 145.

A division fence is a part of the realty, and an answer setting up title thereto raises the question of title to land. *Murray v. Van Derlyn*, 24 W 67.

Where both parties are under obligation to keep a partition fence in repair one cannot charge the other with negligence for the failure to do so. *Pitzer v. Shinnick*, 41 W 676.

Lawful partition fences mean line fences complying with the requirements of the statute, and it is immaterial whether or not they have been divided. *Taylor v. Young*, 61 W 314, 21 NW 488.

One owner in common of a line fence may sue in equity to prevent the opposite owner from removing the fence. *Hoff v. Olson*, 101 W 118, 76 NW 1121.

Compliance with secs. 1391 and 1395, Stats. 1898, is a condition precedent to an action for damages for trespass by cattle. *Walls v. Cunningham*, 123 W 346, 101 NW 696.

A tenant who fails to maintain a partition fence is within the term "owners." *Peterson v. Johnson*, 132 W 280, 111 NW 659.

See note to 172.01, citing *Reuter v. Swarthout*, 182 W 453, 196 NW 847.

An owner of land is relieved from maintaining a partition fence where he conveys to a county for highway purposes a parcel lying parallel to and adjoining said partition fence. 20 Atty. Gen. 128.

The provisions of 90.03, Stats. 1931, are not applicable when land is held in trust for the state by the state historical society. 21 Atty. Gen. 934.